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IN THE

Supreme Court of the United States

October Term, 1988

BILLY RAY APPERSON,

Petitioner,

vs.

FLEET CARRIER CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED*

May an individual union member sue to vacate an arbitration award and enforce a collective bargaining agreement, where the union has represented him fairly before the arbitral panel, but members of the arbitral panel were biased against him and/or the employer's conduct in the arbitration amounted to repudiation of the contract grievance procedure?

*All parties to the proceeding in the court below are listed in the caption.

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BILLY RAY APPERSON,

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FLEET CARRIER CORP.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Billy Ray Apperson petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is not reported and is reprinted as Appendix A at pages 1a to 12a of the appendix to this petition (App. 1a to 12a). The court of appeals' decision was typewritten, and no separate judgment or decree was issued.

The decision of the court of appeals is not recommended for full text publication. Under Sixth Circuit Rule 24(b) counsel may cite an unpublished disposition for precedent in relation to a material issue in a case by providing copies to the court and opposing counsel.

The decision of the district court is not reported and is reprinted as Appendix B at App. 13a to 19a. The judgment of the district court is reprinted as Appendix C at App. 20a to 21a.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion on January 23, 1989. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

A. Facts

Petitioner Billy Ray Apperson worked as a "broker" or owner-operator of a truck for respondent Fleet Carrier Corporation ("Fleet Carrier") in Pontiac, Michigan, for 22 years. In that time until the events of the discharge Fleet Carrier never reprimanded or charged Apperson with a major accident.

He was represented by Teamsters Local 614, and was covered by a collective bargaining agreement (the "Agree-

ment") with a grievance procedure culminating in a final and binding decision.

On May 5, 1986, Apperson was discharged for an alleged major chargeable accident. The only damage claimed in the discharge notice was severe damage to Apperson's "cargo units."

On May 8 and 17, 1986, Apperson filed grievances through Local 614 protesting his discharge. The first grievance sought reinstatement and the second sought backpay and benefits.

The reinstatement grievance was processed to a meeting of the "Tri-City Panel" on May 27, 1986. The Panel is a bipartite group of equal numbers of persons designated by industry employers and superior union officers. It had power as an arbitrator to decide the grievance. Apperson received the Tri-City Panel decision on June 5, 1986. The Panel inexplicably found that Apperson's alleged conduct had caused "extensive damage" not only to the cargo units but to the "Company's trailer." Fleet Carrier had never made such a claim against Apperson.

Apperson's backpay grievance remained in the grievance procedure throughout 1986. After suit was filed the union told Apperson it would be withdrawn.

B. Proceedings Below

Apperson filed suit in October, 1986, within six months of his discharge and the decision on his reinstatement grievance.

The complaint alleged the discharge violated the Agreement in several respects. These included: (1) Fleet Carrier had animus against Apperson because of his past activities of grieving and litigating to protect brokers' pay, (2) Apperson was not responsible for the accident, and (3) even if he were

responsible every other seniority broker who had been fired for such conduct had returned to work. (Complaint § 5)

The complaint did not allege that Local 614 breached its duty of fair representation in presenting the grievance. Rather it alleged the Tri-City Panel decision was void for other reasons. These included: (1) The Panel members, like Fleet Carrier itself, bore animus against Apperson because of his past activities of grieving and litigating in the court to protect brokers' pay,[1] (2) the Panel decision contained a central error of fact in finding that the company's trailer (in addition to the cargo) had incurred extensive damage, and (3) the Panel had never before failed to return to work a seniority broker fired for such conduct. (Complaint § § 11-13)

At the beginning of discovery Fleet Carrier moved for summary judgment solely on the ground that the claim was barred by the three-month time limitation of the United States Arbitration Act, 9 U.S.C. § 12. The motion did not question that Apperson had stated a claim. Nor did it attempt to show that the Tri-City Panel was not corrupt or that Fleet Carrier was blameless in the grievance process. Apperson responded that, being an individual employee rather than a party to the Agreement, the six-month time limitation of National Labor Relations Act, 29 U.S.C. § 160(b) should apply.

The district court held the complaint stated no claim under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. Alternatively it held if a claim were stated under the

[1]The basis for this allegation included the fact that the arbitrators had been present at a national meeting of Teamsters officials and laughed at Apperson because he was a member of TDU (a dissident group) and supposedly was making $147,000 a year, but was suing because he wasn't making enough. That suit was a class action against Fleet Carrier and Local 614 in which Apperson was the lead plaintiff. Moreover, a lawyer in the firm representing Fleet Carrier in the other suit was on the panel that decided his discharge grievance.

United States Arbitration Act it was barred by the three-month limitation.

Before the court of appeals petitioner addressed in detail the district court's holding that no § 301 claim was stated, citing decisions of this Court and other courts of appeal noted *infra*.

In response, respondent conceded that under *United Paper Workers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987), "this is an action under § 301." (Brief of Appellee 13) It acknowledged that an award may be set aside where the union has breached its duty or "where the grievance procedure was a sham and substantially inadequate or unavailable [or there was] fraud or deceit." (Brief of Appellee 10) It argued the district court had reached the proper result even if the ground was wrong, and urged affirmance solely on the basis of the three-month time-bar.[2]

The court of appeals, with one judge dissenting, held that no claim was stated under § 301. Citing *Del Costello v. Teamsters*, 462 U.S. 151 (1983), and *United Parcel Service v. Mitchell*, 451 U.S. 56, 66 (1981) it held "[a]n employee cannot, however, bring a direct § 301 cause of action against an employer to vacate an arbitration award based on wrongful discharge and breach of the collective bargaining agreement which contains an exclusive grievance procedure." The court relied on opinions in an earlier Sixth Circuit case, *Bagsby v. Lewis Bros., Inc.*, 820 F.2d 799 (6th Cir. 1987). App. 5a. Seeking to distinguish *Smith v. Evening News Association*, 371 U.S. 195, 199 (1962), the majority noted the Agreement there contained no arbitration clause. Finding the claim simply one of bias of the arbitration panel, the majority held that permitting petitioner's suit would not further the collectivist objectives

[2]Although Apperson explained his reasons for disputing that point below, he will not address it here absent a cross-petition on that defense.

of the Labor Management Relations Act or the National Labor Relations Act.

Dissenting Judge Nelson, relying on *Smith v. Evening News Association*, *supra*, and other court of appeals decisions, underlined the employer's promise "that the grievance procedure will be allowed to work." App 11a. If the employee can show "fraud, or corruption, or some other fundamental defect in the grievance process" he may sue, Judge Nelson would have held. App 11a.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court and lower courts, and presents the important question whether an individual employee may attack an arbitration award and the underlying breach of contract despite his union's performance of its duty of fair representation, if the grievance process is otherwise corrupt.

Contrary to the Sixth Circuit, this Court has never mechanically required that an unfair representation claim be pleaded against a member's union in order to defeat the exhaustion requirement and state a claim under § 301.

It was first held in 1962 that an individual employee, as well as a union, may sue for breach of a collective bargaining agreement. *Smith v. Evening News Association*, *supra*. Such a suit is necessarily brought under § 301 of the Labor Management Relations Act. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

But before proceeding, an employee "must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 616 (1965) (emphasis in original). See also *Clayton v. International Union*, 451 U.S. 679 (1981).

Two years later the Court highlighted two exceptions to *Maddox* exhaustion in *Vaca v. Sipes*, 386 U.S. 171 (1967). Noting that the grievance procedure is often "controlled by the union and the employer" the Court excused nonexhaustion "when the conduct of the employer amounts to a repudiation of those contractual procedures..." *Id.* at 185.

The Court in *Vaca* defined a second ground where the union has breached its duty of fair representation. *Id.* at 185-86. Employee suits relying on this ground for nonexhaustion have come to be known as "hybrid" § 301 and breach-of-duty suits, after Justice Stewart, harking back to *Vaca v. Sipes*. See *United Parcel Service v. Mitchell*, *supra*, 451 U.S. at 66, 69 (Stewart, J, concurring); *Del Costello v. Teamsters*, *supra*, 462 U.S. at 165.

In none of these cases did the Court suggest that *only* when the union breaches its duty may the employee enforce his rights under a collective bargaining agreement. Though in most of the Court's subsequent cases involving individual employee suits to enforce agreements the employees did rely on the union's breach as a basis for suit,[3] not only has the Court never approved the limitation adopted by the Sixth Circuit, but there have been a number of cases in which the Court recognized other bases for individual enforcement. In all of them, as here, the grievance procedure was exclusive.

Thus in *Glover v. St Louis-San Francisco Ry.*, 393 U.S. 324 (1969) union members under the Railway Labor Act, 45 U.S.C. § § 151 *et seq.*, brought a claim of racially discriminatory enforcement of the collective bargaining agreement. They had not submitted their claim through the administrative pro-

[3]*Del Costello, supra; Mitchell, supra; Clayton v. International Union, supra; Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983); *West v. Conrail*, 107 S. Ct. 1538 (1987); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

cedures set up under the Railway Labor Act. The Court excused plaintiffs from submitting their grievance to a group which was in large part chosen by the defendants against whom their real complaint was made. Futility, rather than the fair representation claim, excused plaintiffs' nonexhaustion. 393 U.S. at 330.

In *Walker v. Southern Railway Co.*, 385 U.S. 196 (1966), a case under the Railway Labor Act, nonexhaustion of dispute resolution procedures was excused because they were too timeconsuming. No breach of union duty was even alleged.

In *Humphrey v. Moore*, 375 U.S. 335 (1964), the Court found that a Teamster joint committee decision was reasonable, and that the union had performed its duty to its members. Instead of resting the decision on that basis, the Court went on to address a contention that the employees were deprived of a "fair hearing" because the union opposed their position. 375 U.S. at 350-51. The Court implicitly recognized a claim of an unfair hearing as a basis for an employee suit under § 301.

The Sixth Circuit did not explain why its result here was consistent with the foregoing principles, despite petitioner's extensive treatment of them. To the contrary the majority denied their existence, holding that since *Smith v. Evening News Association* "no court has allowed an employee to bring a § 301 cause of action against an employer for breach of a collective bargaining agreement which contains an arbitration clause of the type here involved." App. 6a.

The court's reliance on its earlier *Bagsby* decision illustrates the confusion. *Bagsby* and the cases it relied on were hybrid cases making claims against both the employer and the union. The plaintiff made no claim of arbitral bias (there had been no arbitration). *Bagsby* correctly held on those facts that to win against either the company or the union the employee had

to win against both. On those facts other courts, including this Court, have also so held. See footnote 3, *supra*. But this hardly translates to the result reached below.

Contrary to the Sixth Circuit, four courts of appeals have followed this Court's lead in permitting suits by individual union members under § 301, where a breach of union duty was either not alleged or not found. In each of these cases, as here, the court dealt with an exclusive grievance procedure which terminated in a final and binding decision. *Dogherra v. Safeway Stores*, 679 F.2d 1293 (9th Cir. 1982) (employer fraud in lying to union causing it to drop grievance); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870 (3d Cir. 1972) (employer repudiation of contract); *Boone v. Armstrong Cork Co.*, 384 F.2d 285 (5th Cir. 1967) (misunderstanding of all parties as to availability of grievance procedure); *Rothlein v. Armour & Co.*, 391 F.2d 574, 579 (3d Cir. 1968) (quality of proposed grievance procedure possibly inadequate); *Bieski v. Eastern Automobile Forwarding Co.*, 396 F.2d 32 (3d Cir. 1968) (one member of grievance committee biased and union took neutral position on issue before grievance committee); *Kirkland v. Arkansas-Best Freight System*, 629 F.2d 538 (8th Cir. 1980), cert. denied 450 U.S. 980 (1981) (procedural defects and improper composition of grievance committee). See also *Anderson v. Norfolk & Western Ry. Co.*, 773 F.2d 880 (7th Cir. 1985) (collecting cases). *Contra: Acuff v. United Papermakers and Paperworkers*, 404 F.2d 169 (5th Cir. 1969), cert. denied 394 U.S. 987 (1969) (employee did not have standing to challenge arbitration award under Arbitration Act, 9 U.S.C. § 10).

Of course petitioner may not prevail here simply because he disagrees with the grievance decision. He must first show, as dissenting Judge Nelson stated, that because of arbitrator bias or employer machinations, the grievance machinery has not been "allowed to work." App. 11a. This stringent require-

ment will screen from the courts employee litigants who are merely displeased with an arbitral result, as indeed it has in the circuits which allow claims such as petitioner's.

The issue posed by the conflicting decisions of the courts of appeal raises a fundamental policy issue. Individual interests — where they do not undercut the union's collective interest — must be secured. As illustrated above, in many cases a local union arguing a grievance has done its job as well as might be expected. But the process has been skewed because of forces beyond its knowledge or control. It may not have the incentive or the will to proceed in court, especially where the arbitrators designated by union superiors are involved.

But if an individual member shows that the procedure itself has been corrupted, with or without union complicity, it does not disserve collective interests to allow him to sue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 24, 1989

APPENDIX A

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

FILED

JAN. 23, 1989

LEONARD GREEN, Clerk

NOT FOR PUBLICATION

NO. 87-2060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLY RAY APPERSON, Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE
V.	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
FLEET CARRIER CORPORATION, Defendant-Appellee.	)	DISTRICT OF MICHIGAN

DECIDED AND FILED _____

BEFORE: **WELLFORD** and **NELSON**, Circuit Judges; and **McQuade**,* District Judge.

Wellford, Circuit Judge. This case involves the question of whether an employee represented by a union that has entered a collective bargaining agreement which contains exclusive grievance procedures may state a "hybrid" cause of action under § 301 of the Labor Management Relations Act of 1947 without alleging that the union has breached its duty of fair representation.

The district court first held that an employee cannot state such a claim and, further, that it was barred by the statute of limitations. We affirm.

Defendant Fleet Carrier Corporation (Fleet) discharged Billy Ray Apperson, the plaintiff, a truck driver, on May 5, 1986. Fleet concluded that Apperson was at fault in a "major chargeable accident" which occurred on February 27, 1986 when Apperson's truck "loaded with four (4) cargo units, ran off [the] roadway causing [his] tractor and trailer to overturn ... severely damaging all four (4) cargo units."

Apperson, through his union, Teamsters Local 614, filed three grievances. On May 8, 1986, Apperson appealed his discharge and sought reinstatement of his previous position. On May 17, 1986, Apperson filed a grievance for back pay and benefits and a grievance protesting the issuance of a reprimand for conduct unrelated to the discharge.

The collective bargaining agreement between the Teamsters and Fleet contained specific procedures for the resolution of employee grievances. The union is charged with pursuing the employee's grievance. Apperson's grievances were submit-

*THE HONORABLE RICHARD B. McQUADE, JR., United States District Court for the Northern District of Ohio, sitting by designation.

ted to a grievance panel in accordance with the agreement. Because the local panel did not settle or decide the first discharge grievance, the grievance was sent under contract procedures to the Michigan Automobile Transporters Tri-City Panel for a hearing on May 27, 1986. At that hearing, which Apperson attended, the grievance was discussed, evidence was presented and the grievance was denied. Apperson received notification of the decision by certified mail on June 6, 1986 from Leonard Williams, the Business Representative and Secretary-Treasurer for Local 615. [sic]

The minutes from the Tri-City Panel noted mistakenly that Apperson's accident occurred on March 27, 1986. On June 5, 1986, Williams received a letter from the National Automobile Transporters Labor Division indicating that the date of Apperson's accident should read *February* 27, and that the minutes of the next meeting would reflect this correction.

There is some confusion over the other two grievances. Williams received notification of the denial of the first discharge grievance on June 5, 1986. He sent Apperson three letters, dated June 12, 1986, August 13, 1986, and October 17, 1986, stating that the remaining two grievances would be discussed at the next meeting of the Michigan Automobile Transporter's Local Panel. The grievances, however, apparently were never discussed at any of the three meetings. Then, on January 13, 1987, Williams sent Apperson a letter stating that "In light of the Joint State Arbitration Committee's controlling and contractually final decision in Case No. 5-86-500 to sustain your discharge we are withdrawing your second discharge and reprimand grievances from the Committee's docket." The committee minutes did not indicate that the reprimand grievance was actually withdrawn.

On October 30, 1986, Apperson filed this action in the United States District Court for the Eastern District of Michigan. Ap-

person named only Fleet, and not his union, as a defendant. He claimed that his discharge and reprimand violated the collective bargaining agreement because they were without just cause and were in retaliation for his other lawsuit against Fleet relating to other matters. He also complained that the committee, composed of union and employer representatives "bore animus against Apperson because his lawful and protected activities, including association with other workers, grieving, representing union members, suing in this court to protect brokers' interest in ancillary charges which have not been justified by the company, and declining to be bound by fraudulent grievance decisions in the past." Apperson was referring to his affiliation with Teamsters for a Democratic Union (TDU) and his lawsuit against Fleet.

The district court granted Fleet's motion for summary judgment, concluding first that Apperson had not stated a cause of action under § 301 of the LMRA, 27 U.S.C. § 185, because he failed to allege a breach of fair representation claim. In the alternative, if a § 301 claim or any other claim were stated, the court held that the three month statute of limitations borrowed from or directly from the United States Arbitration Act, 9 U.S.C. § 12, barred Apperson's cause of action. We hold that Apperson had failed to state a cause of action, and do not reach the statute of limitation issue.[1]

Reading Apperson's complaint liberally, Apperson contends that the results of the grievance procedure should be set aside because the union and management representatives on the arbitration panel were biased against him because he has sued

[1]*See, e.g., United Mine Workers of America, District 4 v. Cyprus Emerald Resources Corp .*, 681 F. Supp. 271 (W.D. Pa 1988) (discussing whether hybrid and pure employee § 301 actions require different limitations period).

Fleet and participated in the activities of a dissident Teamsters faction. An employee cannot, however, bring a direct § 301 cause of action against an employer to vacate an arbitration award based on wrongful discharge and breach of the collective bargaining agreement which contains an exclusive procedure. *See Bagsby v. Lewis Bros., Inc.*, 820 F.2d 799, 804 (6th Cir. 1987)(Ryan, J., concurring). In addition, an employee cannot bring a "hybrid" § 301action without an accompanying colorable claim that the union has breached its duty of fair representation. *Id.* at 801 (plurality opinion).

The purpose of the LMRA is to allow unions and employers to enter collective bargaining agreements and to bind employees to the agreement's provisions. It is, therefore, common to see "straightforward" § 301 actions by unions, on behalf of employees, against employers, challenging the results of arbitration procedures. *See, e.g., United Paperworkers International Union v. Misco*, Inc., 108 S. Ct. 364 (1984).

The only case which suggest that an employee himself has such a cause of action is *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). In *Smith* the Court allowed an employee to bring a cause of action under § 301 for breach of the collective bargaining agreement. But the Court stated "we need not consider the question of federal law whether [the employee], under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal in the standing of other employees to sue upon other clauses on other contracts." *Id.* at 201 n.9. Justice Black dissented in *Smith*, stating "it seems to me that the Court studiously refrains from saying when, for what kinds of breach, or under what circumstances an individual employee can bring a § 301 action and when he must step aside for the union to prosecute his claim. Nor does the Court decide whether the suit brought

in this case is one of the types which an individual can bring. This puzzles me." *Id.* at 204 (Black, J., dissenting).

The collective bargaining agreement at issue in *Smith* did not contain an arbitration clause. *See Id.* at 196 n.1. Since the decision in *Smith*, no court has allowed an employee to bring a § 301 cause of action against an employer for breach of a collective bargaining agreement which contains an arbitration clause of the type here involved. We conclude that no cause of action exists through which an employee can bring an action to set aside a grievance resolution in order to allow a court to address whether an employee's discharge violated a collective bargaining agreement. Courts have consistently favored the resolution of labor disputes through arbitration where a collective bargaining agreement so provides. *See United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). When a collective bargaining agreement contains exclusive and final procedures for the resolution of employee grievances, the employee's ability to bring an action under § 301 is severely restricted. *See e.g., Hart v. Nat'l Homes Corp.*, 668 F.2d 791, 793 (5th Cir. 1982). Under most circumstances courts will not review facts or legal issues resolved by the dispute resolution mechanism of the collective bargaining agreement. *International Union of Electrical, Radio & Machine Workers, AFLCIO-CLC v. Ingram Mfg. Co.*, 715 F.2d 886, 891 (5th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984). Apperson must establish a legally cognizable justification for disregarding the resolution of his grievance obtained through the exclusive procedures of the collective bargaining agreement. *Morris v. Werner-Continental, Inc.*, 466 F.2d 1185, 1190 (6th Cir. 1972), *cert. denied*, 411 U.S. 965 (1973).

The United States Supreme Court has allowed the employee to intervene and attack an arbitration result in a limited "hybrid" action. The Court has stated that the "rule [of finality] works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation." *Del Costello v. Teamsters*, 462 U.S. 151, 164 (1982). Because the LMRA and other federal labor statutes place a high premium on the union's ability to act on the employee's behalf, the union's failure to represent its employee zealously undermines the confidence in the arbitral result. *See, Dinger v. Anchor Motor Freight, Inc.*, 501 F. Supp. 64, 67 (S.D.N.Y. 1980).

The hybrid § 301 action, recognized by the Supreme Court, has two components. The first component is a claim that the employer has breached the collective bargaining contract. The second component is a claim that the union has breached its "duty of fair representation, which is implied under the scheme of the National Labor Relations Act [NLRA]." *Del Costello*, 462 U.S. at 16465. As the Court noted, "the two claims are inextricably interdependent." *Id.* 164-65 (quoting *United Parcel Service v. Mitchell*, 451 U.S. 56, 66 (1981). The employee can sue either the union or the employer or both — but the cause of action is the same. *Del Costello*, 462 U.S. at 165.

Clearly, Apperson has not pleaded or argued that the Teamsters breached their duty of fair representation as exemplified by the string of "hybrid" § 301 action cases. Apperson's attorney actually states to the district court that "[b]y outward appearances, it seemed that the union stood by [Apperson] at the grievance meeting." Before this court, Apperson's attorney insisted that this is not a fair representation case, but a case that bears a "familiar resemblance" to the typical "hybrid" § 301 claim. Apperson does not challenge

the union's zeal in pursuing his grievances. In light of the decision on the first discharge grievance, the union's decision to withdraw the second discharge grievance does not seem unreasonable and is certainly not arbitrary or capricious. *See, e.g., Del Costello*, 462 U.S. 151; *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Bagsby*, 820 F.2d 799; *Spielman v. Anchor Motor Freight, Inc.*, 551 F. Supp. 817, 820 (S.D.N.Y. 1982).

Apperson also does not contend that the union breached its duty of fair representation by failing to protect him from an allegedly biased arbitration proceeding. *See, e.g., Spielman*, 551 F. Supp. at 817 (stating "plaintiff's claim of unfair representation turns on the failure of his union representative to challenge the membership of the arbitration panel as biased..., because of his activities in the Teamsters for a Democratic Union..., a national organization of dissident union members"); *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971). Because the plaintiff has conceded that no breach of duty claim has been stated, we conclude that no breach of duty is alleged.

Reading Apperson's claim most generously, Apperson questions the partiality of the union representatives on the arbitration panel. Apperson also states, without alleging any factual basis and using the key language found in § 10 of the USAA, that the grievance procedure was "prejudiced by corruption, fraud, undue means, evident partiality, misconduct, misbehavior, and excess of powers." Apperson here is attempting to create a hybrid § 301/United States Arbitration Act (USAA), 9 U.S.C. § 1 *et seq.*, cause of action by charging that those making decisions in the arbitration process were somehow "biased." The Arbitration Act, however, contains a three month statute of limitations and specifically *excludes* contracts of employment of individuals involved in the transpor-

tation industry. *See* 9 U.S.C. § § 1, 12; *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). *Sine v. Local No. 992 Internat'l Brotherhood of Teamsters*, 644 F.2d 997, 1002 (4th Cir.) *cert. denied*, 454 U.S. 965 (1981); *Paramount Bag Mfg. Co. v. Rubberized Novelty & Plastic Fabric Workers Union, Local 98*, 353 F. Supp. 1131, 1139 (E.D.N.Y. 1973); *see also Sedlarik v. General Motors Corp.*, 54 F.R.D. 230, 233 (W.D. Mich. 1971)(in § 301 cases, because of their nature, "it is incumbent upon the party seeking relief to set out with greater specificity those facts which entitle him to present his case in court").

We hold that Apperson has not stated a cause of action under § 301 under these circumstances. Apperson's claim is simply one of bias of the arbitration panel and therefore must be pursued through the exclusive remedies contained in the collective bargaining agreement. If the union then breaches its duty of fair representation and fails to pursue the claim satisfactorily, the employee may properly maintain a hybrid § 301 claim against either his union and/or his employer. Allowing the employee to circumvent the terms of the collective bargaining agreement when the union is not alleged to have breached its duty of fair representation does not further the objectives of the LMRA or the NLRA.

For the foregoing reasons this court **AFFIRMS** the decision of the district court.

DAVID A. NELSON, Circuit Judge, dissenting. The type of lawsuit that Justice Stewart called "a hybrid '§ 301 and breach of duty sui[t]'" combines (1) a claim under § 301 of the Labor Management Relations Act (29 U.S.C. § 185) for an employer's breach of a labor agreement and (2) a related claim that a labor union has violated the duty of fair represen-

tation implicit in the National Labor Relations Act. *United Parcel Service v. Mitchell*, 451 U.S. 56, 65 (1981)(Stewart, J. concurring)(quoting *Vaca v. Sipes*, 386 U.S. 171, 197 n.18 (1967)). By definition, an employee may not state a "hybrid" claim of this sort without alleging a breach of his union's duty of fair representation.

The fact the employee in the case at bar has failed to state such a "hybrid" claim, however, does not necessarily make it impossible for the employee to vindicate his individual contract rights in an action under § 301 *simpliciter*. Speaking through Justice White, and with only Justice Black dissenting, the United States Supreme Court has declared that to exclude from the ambit of § 301 all suits to vindicate individual employee rights arising from a collective bargaining agreement would "stultify" the Congressional policy underlying the Labor Management Relations Act. *Smith v. Evening News Association*, 371 U.S. 195, 200 (1962). "The same considerations," the *Smith* court went on to hold, "foreclosereading...§ 301 to exclude all suits brought by employees instead of unions. *** Neither the language and structure of § 301 nor its legislative history requires or persuasively supports this restrictive interpretations, which would frustrate rather than serve the congressional policy expressed in that section." *Id.* *Smith* holds that individual employees *may* sue their employers under § 301, without asserting any breach of the union's duty of fair representation, and in the absence of intervening Congressional action or a repudiation of *Smith* by the Supreme Court itself, I take it that the holding remains binding on us whether or not the Court periodically finds occasion to tell us that the case is still good law. I know of no sunset provision for decisions of the United States Supreme Court.

Where a collective bargaining contract establishes mandatory grievance resolution procedures, to be sure, an individual employee normally cannot recover a judgment against his

employer in respect of a grievance on which the employee has not prevailed under the contract mechanism unless there has been a breach of the union's duty to represent the employee fairly — for where the union has done its job, normally there will have been no breach of contract by the employer. The employer does not promise that mistakes will never be made, by it or by the grievance panel; what the employer promises, rather, is that the grievance machinery will be allowed to work.

It does not follow from this that the employer is immune from a breach of contract action under § 301 where, notwithstanding faithful representation by his union, the employee can show that there had been fraud, or corruption, or some other fundamental defect in the grievance process. I agree with the Fifth and Ninth Circuits that an individual employee cannot attack a final award rendered under a collective bargaining agreement "except on the grounds of fraud, deceit, *or* breach of the duty of fair representation *or* unless the grievance procedure was a sham, substantively inadequate or substantially unavailable." *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971)(referring to *Rothlein v. Armour & Co.*, 391 F.2d 574, 579 (3d Cir. 1968); *Andrus v. Convoy Company*, 480 F.2d 604, 606 (9th Cir.), *cert. denied*, 414 U.S. 989 (1973). (Emphasis supplied.) See also *Humphrey v. Moore*, 375 U.S. 335 (1964). And just as an employee may sue under § 301 where there has been a breach of duty of fair representation but no fraud or corruption, I believe that an employee may sue under § 301 where there has been fraud or corrouption but no breach of the duty of fair representation.

We cannot tell, from the record before us, whether the decision rendered by the grievance panel in Mr. Apperson's case was in fact tainted by fraud or corruption. Mr. Apperson alleges in his complaint that "[t]he decision was prejudiced by corruption, fraud, undue means, evident partiality, misconduct,

misbehavior, and excess of powers. . . ." These allegations are denied in the employer's answer, but in moving for summary judgment the employer pressed only its statute of limitations defense and made no attempt to show the non-existence of any genuine issue of material fact regarding the alleged corruption, fraud, and so forth.

The district court found it unnecessary to decide the statute of limitations question, except insofar as the court held that if the Federal Arbitration Act applies here, the plaintiff's claim is barred by the three-month limitation period prescribed in that Act. Resting its decision primarily on a theory not urged by the employer, the district court held that "[s]ince plaintiff has not alleged that the union failed to fulfill their duty of fair representation, he has not stated a cause of action under § 301 in his complaint."

For the reasons sketched out above, I would not have disposed of this case on that ground. I must therefore dissent, respectfully, from my colleagues' decision to accept the district court's reasoning and to affirm the judgment on the basis of that reasoning. Whether the judgment could properly be affirmed on statute of limitations grounds is a question with which I shall not attempt to wrestle, my colleagues not having reached the issue.

ISSUED AS MANDATE: February 14, 1989
COSTS: None

A TRUE COPY:
LEONARD GREEN, Clerk
By /s/ [illegible]
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

BILLY RAY APPERSON,
Plaintiff,

v.

FLEET CARRIER CORPORATION
Defendant.
_____/

CIVIL ACTION

NO. 86-5428

HON. RICHARD F. SUHRHEINRICH

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant Fleet Carrier Corporation's ("FCC") motion for summary judgment. Plaintiff Billy Ray Apperson has responded to the motion, and defendant has replied. The Court entertained the arguments of counsel on July 16, 1987 and now renders its decision.

This lawsuit was filed by plaintiff Billy Ray Apperson ("Apperson") on October 30, 1986. Apperson alleged that FCC, his former employer, had breached a collective bargaining agreement and that a grievance procedure had broken down. These allegations arose out of incidents surrounding Apperson's discharge on May 5, 1986 by FCC. The discharge was assertedly due to a "major chargeable accident after full investigation."

The referenced accident occurred on March 27, 1986 near Dixon, Missouri when Apperson's tractor and trailer overturned, severely damaging the four cargo units he was hauling.

Following his discharge, Apperson filed grievances on May 8 and 17, 1986 protesting the discharge with Local 614 of the International Brotherhood of Teamsters ("Teamsters"). The first grievance sought reinstatement and the second sought benefits and pay lost due to the discharge.

A local level union grievance panel met to consider the first grievance on May 16, 1986. At that meeting, the grievance was not settled or decided and so was sent to a tri-city panel for decision. A subsequent meeting of the Michigan Automobile Transporters Tri-City Panel was held regarding the grievance on May 27, 1986. Apperson was informed by a letter dated June 5, 1986 that the discharge would be upheld.[1] On January 13, 1987, Apperson was informed that the May 17, 1986 grievance would be withdrawn in light of the decision in the May 5, 1986 grievance. On March 23, 1987, the local panel met and withdrew the May 17, 1986 grievance.

The parties do not dispute the facts of this case. Rather, they differ as to the law which governs this case. Defendant FCC asserts that Apperson's lawsuit is an action for vacation of an arbitration award under § 301 of the Labor Management Relations Act (LMRA)[2] which should be governed by the three-month statute of limitations set forth in the Federal Arbitration Act, 9 U.S.C. §§ 1-14. Apperson's claim would be time-barred under the three-month statute, as his cause of action arose on June 5, 1986 when the Tri-City Panel upheld

---

[1]The Tri-City Panel's decision described Apperson's accident as "causing extensive damage to the cargo and the company's trailer." Whether any damage to the trailer occurred is disputed between the parties. Apperson asserts the trailer was undamaged and that his discharge was, therefore, improper.

[2]Section 301 of the Labor Management Relations Act is encoded at 29 U.S.C § 185.

his discharge and this case was not filed until October 30, 1986. Thus, FCC requests the Court to render summary judgment in its favor. As an alternative argument, FCC contends that Apperson's action is not a proper hybrid § 301 action. FCC asserts that, even if it is not a hybrid § 301 action, this action would be barred under the Federal Arbitration Act.

Apperson alleges that this action is a hybrid § 301 action, and that the six-month statue of limitations contained in § 10(b) of the National Labor Relations Act, 28 U.S.C. § 16(b), should apply. Under the six-month statute of limitations, this case would not be time-barred. Apperson contends that *Del Costello v. Teamsters*, 462 U.S. 151 (1983), dictates the use of the sixmonth statute of limitations.

Under Fed. R. Civ. P. 56 (c), summary judgment may be granted when there is no genuine issue as to any material fact and when the moving party is entitled to summary judgment as a matter of law. *Atlas Concrete Pipe, Inc. v. Roger J. Au & Sons, Inc.*, 668 F.2d 905 (6th Cir. 1982); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974). When determining a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *Watkins v. Northwestern Ohio Tractor Pullers Ass'n*, 630 F.2d 1155, 1158 (6th Cir. 1980). Further, all reasonable inferences to be drawn from the evidence must be made in the nonmoving party's favor. *Adickes v. Kress*, 398 U.S. 144, 159 (1970). These standards shall be applied in determining the present motion.

In a hybrid § 301 action, an employee sues an employer and/or a union, alleging that the employer has breached a provision of a collective bargaining agreement in contravention to § 301, and that the union has breached its fair representation by mishandling the ensuing grievance and arbitration proceedings. *Del Costello, supra*. As *Del Costello* states:

> To prevail against either the company or the union,... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union. (citations omitted.) The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one , the other, or both. The suit is thus not a straight forward breach-of-contract suit under § 301,... but a hybrid § 301/fair representation claim, amounting to a "direct challenge to the private settlement of disputes under the [collective-bargaining agreement].

462 U.S. at 165, *quoting Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976) and *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 66 (1981). In *Del Costello*, the Supreme Court borrowed the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), as the statute of limitations for hybrid § 301 actions.

Plaintiff has alleged that his action is a hybrid § 301 suit and that the six-month statute of limitations should apply. However, the plaintiff's complaint does not allege that his union breached its duty of fair representation. Nor have plaintiff's pleadings alleged or demonstrated that the union breached its duty. Rather, as stated by the plaintiff's counsel, "[b]y outward appearances, it seemed that the union stood by [Apperson] at the grievance meeting." In the absence of a showing of a breach of the union's duty of fair representation, the Court concludes that a hybrid § 301 case has not been presented.

The plaintiff himself admits that his action is not the "usual kind" of hybrid case. In fact, plaintiff attempts to fit his action

into § 301 as a type of hybrid action which may be postulated in *Vaca v. Sipes*, 386 U.S. 171 (1967) or in *Holodnak v. Avco Corp.*, 381 F. Supp. 191 (D. Conn. 1974), *aff'd in part and rev'd in part on other grounds*, 514 F.2d 285 (2d Cir. 1975), *cert. denied*, 423 U.S. 892 (1975). The Court has been unable to locate case law supporting plaintiff's position.[3] Absent case law supporting the plaintiff's hybrid § 301 claim, the Court finds that plaintiff has not demonstrated that he has a hybrid § 301 action.

Further, a review of Apperson's complaint indicates that the primary remedy which seeks is the vacating of an arbitration award. Although plaintiff contends that his employer breached his contract, his complaint seeks reinstatement with full back pay. Thus, it is apparent that he is dissatisfied with the arbitration decision upholding his discharge, and that he merely seeks to vacate that arbitration decision. Such a claim may be brought under § 301 only as a hybrid § 301 action. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568 (1976) (where union actually utilizes the grievance and arbitration procedures on behalf of the employee, focus of inquiry is on whether employer breached the contract and whether a union breach of duty occurred). Since plaintiff has not alleged that the union failed to fulfill their duty of fair representation, he has not stated a cause of action under § 301 in his complaint. *See Humphrey v. Moore*, 375 U.S. 335 (1964)(arbitration committee's decision is binding where the union had not breached its duty of fair representation).

---

[3]At hearing, plaintiff's counsel suggested that *Holodnak* supported his position. Notably, counsel later retracted his reliance on *Holodnak*, indicating that further research disclosed that *Holodnak* did not stand for this proposition. As indicated to this Court by counsel, the *Holodnak* court relied on the Federal Arbitration Act to reach its decision.

As the plaintiff has not stated a hybrid § 301 claim, the Court need not reach the question of which statute of limitations applies to a hybrid § 301 action.

Finally, since the plaintiff seeks the vacating of an arbitration award, the Court notes that the Federal Arbitration Act could apply to this action. The Sixth Circuit has held that the Arbitration Act may apply to collective bargaining agreements. *See Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49 (6th Cir. 1954) (collective bargaining agreements do not fall within the "contracts of employment" which are exempted by the Arbitration Act). *See also Chattanooga Mailers Union v. Chattanooga News-Free Press Co.*, 524 F.2d 1305 (6th Cir. 1975); *J. L. Foti Construction Co. v. Laborers' International Union Local 310*, 742 F.2d 994 (6th Cir. 1984)(Kennedy, J. concurring). However, as correctly concluded by the defendant, even if the Arbitration Act applies in this case, the plaintiff's action would be barred by the Act's three-month statutes of limitations. 9 U.S.C. § 12. The Court concludes that, as there is a time bar to plaintiff's lawsuit even if the Arbitration Act applies, the merits of a potential Arbitration Act claim need not be reached.

Since plaintiff has not established a cause of action under § 301 and since plaintiff's lawsuit would be time barred under the Federal Arbitration Act, the Court concludes that defendant FCC is entitled to summary judgment as a matter of law.

Accordingly,

IT IS HEREBY ORDERED that defendant FCC's motion for summary judgment is GRANTED.

RICHARD F. SUHRHEINRICH
United States District Judge

DATED: September 30, 1987

A TRUE COPY

CLERK, U.S. DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

BY _____
DEPUTY CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILLY RAY APPERSON,
Plaintiff,

v.

FLEET CARRIER CORPORATION,
Defendant.

A TRUE COPY CLERK, U.S. DISTRICT COURT EASTERN DISTRICT OF MICHIGAN

BY _____

DEPUTY CLERK

CIVIL ACTION NO. 86-5428

HON. RICHARD F. SUHRHEINRICH

JUDGMENT

The above-entitled action having come before the Court, on defendant's motion for summary judgment, Honorable Richard F. Suhrheinrich, United States District Judge, presiding, and a decision having been duly rendered in the Court's Memorandum Opinion and Order entered this date,

IT IS ORDERED AND ADJUDGED that summary judgment be, and is hereby is, GRANTED in favor of defendant.

Dated at Detroit, Michigan, this 30th day of September, 1987.

APPROVED:

RICHARD F. SURHEINRICH
United States District Judge

ROBERT A. MOSSING
Clerk of the Court

By: _____
Deputy Clerk

FILED
JUL 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1735

IN THE

Supreme Court of the United States

BILLY RAY APPERSON,
Petitioner,

vs.

FLEET CARRIER CORP.,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARFOOS, REITER, PETERSON
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CASILLAS PRESS, INC. – 1717 K STREET NW WASHINGTON, DC 20036 – 223-1220

LISTING OF COMPANIES AND AFFILIATES OF RESPONDENT

Pursuant to Rule 28.1, Respondent sets forth the following information. Respondent Fleet Carrier Corporation is a subsidiary of the Automotive Carrier Division of Ryder System, Inc.

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IN THE

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No. 88-1735

BILLY RAY APPERSON,
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FLEET CARRIER CORP.,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent Fleet Carrier Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is not reported and is reprinted as Appendix A at pages 1(a)-12(a) of the Appendix to the Petition for Writ of Certiorari.

COUNTERSTATEMENT OF FACTS

A. Facts.

Respondent Fleet Carrier Corporation ("Respondent" or "Fleet") adopts the discussion of facts set forth in the District Court's Memorandum Opinion and Order found in Appendix

B at App. 13a-15a[1] and in the Court of Appeals' decision found at App. 2a-5a.

B. Proceedings Below.

The Petitioner filed his Complaint in District Court on October 30, 1986, more than three months after his collective bargaining representative notified him of the arbitration decision denying his grievance and upholding his discharge by the company. After answering the Complaint, Fleet filed a Motion for Summary Judgment which was supported with affidavits from representatives of the company and of Teamsters Local 614 concerning the discharge and subsequent arbitration of the grievance challenging the company's action.

The District Court stated that the facts were not in dispute and that the parties differed as to the law to be applied to the issue of the appropriate limitations period. The court noted that Fleet asserted that the lawsuit was an action for the vacation of an arbitration award under Section 301 of the Labor Management Act ("LMRA"), 29 U.S.C. Section 185(a) which should be governed by the three-month statute of limitations set forth in the Federal Arbitration Act, 9 U.S.C. Section 12. The Petitioner contended that the action was a "hybrid" Section 301 action and that the sixth-month statute of limitations contained in Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b) should apply (App. 14a-15a).

The District Court rejected Apperson's contention that his case was properly classified as a "hybrid" action under Section 301. The court noted that the Complaint did not allege that the local union breached its duty of fair representation in the processing of the grievance protesting the discharge

[1]References to the Appendices to the Petition are designated as "App. ____a."

and concluded that, in the absence of a showing or at least an allegation of a breach of the union's duty of fair representation, a hybrid Section 301 case has not been presented (App. 17a-18a). The court considered the Petitioner's attempt to fit the facts of the case into the Section 301 "hybrid" mold and concluded that the Petitioner had not demonstrated that he had, in fact, a hybrid Section 301 case. The court noted that the primary remedy sought was the vacation of the arbitration award, and the court concluded, apart from the issue of the existence of a hybrid action, that the case would be barred by the Arbitration Act's three-month statute of limitations (9 U.S.C. Section 12) (App. 18a).

The Court of Appeals acknowledged that the District Court held that an employee could not state a "hybrid" cause of action under Section 301 of the LMRA without alleging that the union had breached its duty of fair representation (App. 4a). The panel majority opinion did not reach the statute of limitations issue because of its agreement with the District Court that the Petitioner had failed to state a cause of action (App. 4a).

In his brief to the Court of Appeals (Brief of Appellant, 9-11), the Petitioner addressed at length his unique definition of a "hybrid" action and acknowledged that his use of the term was not the same as was recognized by the District Court or as commonly understood in labor relations. The panel majority stated that the hybrid section 301 action has two components and that the Petitioner had not pled nor argued that the local union violated its duty of fair representation (App. 7a). The panel majority noted that counsel for Petitioner stated that the case "bore a familiar resemblance" to the typical hybrid Section 301 case, but the panel majority concluded that no cause of action had been stated under Section 301 under the circumstances of the case. The lower court's decision was affirmed (App. 7a-8a).

REASONS FOR DENYING THE WRIT

1. Neither the decision below nor the record raises the Question Presented in the Petition.

The sole question presented in the Petition is whether an action by an individual to vacate an arbitration award where the union has fairly represented the individual can be maintained where there is bias alleged against the arbitral panel and/or the employer's conduct in the arbitration amounted to a repudiation of the grievance procedure (Petition, p. (i)). Unfortunately, the issue was not similarly framed before the District Court or in the Court of Appeals. The terminology used by the Petitioner resulted in a semantic quagmire over the meaning of "hybrid."

The District Court correctly noted that Fleet maintained that the lawsuit was an action for the vacation of an arbitration award under Section 301 which should be governed by the three-month statute of limitations under 9 U.S.C. Section 12. Fleet also argued that the action was not properly a "hybrid" Section 301 action. Petitioner alleged that the action was a hybrid 301 action and that the six-month statute of limitations contained in Section 10(b) of the NLRA, 28 U.S.C. Section 16(b) should apply. Having framed the issue, the District Court correctly noted that the petitioner had not stated a hybrid Section 301 claim because there was no allegation of the breach of the duty of fair representation.

The panel majority framed the issue as whether an employee fairly represented by a union may state a "hybrid" cause of action under Section 301 without alleging that the union had breached its duty of fair representation (App. 2a). The panel majority agreed with the District Court that an employee cannot state such a claim.

It is important to recognize that Petitioner utilized the "hybrid" term to take advantage of this Court's earlier decision in *DelCostello* concerning the appropriate statute of limitations. A true "hybrid" action is governed by the six-month limitations period set forth in Section 10(b). In his brief to the Court of Appeals, the Petitioner stated that the issue on appeal was whether a claim for an employee's discharge has been stated under Section 301; and if so, whether a six-month limitation applies so that the action was timely filed; and if not, whether it was timely filed under the three-month limitation of the Federal Arbitration Act (Appellant's Brief, 1). The preoccupation with the meaning and definition of "hybrid" was a direct result of Petitioner's attempt to give a different meaning to this term than has been understood and uniformly applied by the courts in the labor relations context. See, e.g. *DelCostello*, 462 U.S. at 165. Petitioner argued that hybrid should be used in the labor context simply to be a combination of two claims in one suit; one seeking to remedy a contract breach and the other seeking to avoid the exclusivity of the contract remedies (Appellant's Brief, 10).[2]

To the extent that any conflict arises out of the Court of Appeals' decision, such conflict does so only because of the semantics used by Petitioner. The particular facts of this case as posed by the Petitioner led the District Court and the Court of Appeals to frame the issue as whether Petitioner had stated a claim which would be recognized as a hybrid action under Section 301. The decisions are correct with respect to their treatment of that issue. The conflict Petitioner asserts is more apparent than real. There is no important question of federal

[2]At the hearing on the motion, the District Court stated that it was having difficulty understanding the Petitioner's hybrid Section 301 action and that this difficulty is why the Court wanted the Petitioner's counsel to "express it more fully on the record" than what he had done in his brief (Joint Appendix 86(a)).

law for this Court to settle nor is there any reason to grant Petitioner's request. The case does not present facts upon which to resolve the question presented; the uniqueness of its facts precludes review by this Court.

2. The decision below is correct notwithstanding the Question Presented.

The District Court's decision set forth an alternate basis supporting the granting of summary judgment, namely that Petitioner's claim would be time barred under the three-month limitations period set forth in the United States Arbitration Act 9 U.S.C. Section 12 (App. 18a).

The statute of limitations issue was not addressed in the Court of Appeals. The majority noted that the District Court had borrowed the limitations period set forth in 9 U.S.C. Section 12 but did not reach the issue because of its holding that no cause of action had been stated (App. 4a). Similarly, the dissent did not discuss whether the judgment could have been affirmed on the statute of limitations ground (App. 12a).

The District Court's decision to borrow the three-month limitations period is consistent with this Court's decisions in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. ____, 98 L.Ed. 2d 286 (1987) and in *DelCostello v. Teamsters*, 462 U.S. 151 (1983). Other courts have "borrowed" the three-month limitations period as the most appropriate limitations period under factual situations similar to the present case where a party sought to vacate an arbitration award. *See, e.g., American Postal Workers Union v. United States Postal Service*, 823 F.2d 466 (11th Cir. 1987); *Occidental Chemical Corp. v. Local 820, International Chemical Workers Union*, 853 F.2d 1310 (6th Cir. 1988); *Bacashihua v. United States Postal Service*, 859 F.2d 402 (6th Cir. 1988). The Court of Appeals undoubtedly would have followed its earlier deci-

sions in *Occidental Chemical* and *Bacashihua*. Since the decision below is correct without regard to the issue as framed by the Petitioner, there is no compelling reason for this Court to grant review. There well may be other cases which would present the issue as framed by the Petitioner, but this case does not serve as a proper vehicle for such review.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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July 6, 1989

SEP 5 1989
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No. 88-1735

IN THE
Supreme Court of the United States
October Term, 1988

BILLY RAY APPERSON,

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FLEET CARRIER CORP.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1735

BILLY RAY APPERSON,

Petitioner,

vs.

FLEET CARRIER CORP.,

Respondent,

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY

Respondent disputes neither that there is a conflict in the circuits, nor that this case presents important policy issues. Rather it asserts that this case is a poor vehicle, and the case can be decided in its favor on other grounds. Petitioner will respond briefly to each point.

A. The Pleadings Below Provide An Appropriate Vehicle For Considering The Question Presented

Respondent acknowledges "conflict" arising out of the court of appeals' decision, but asserts that it is more apparent than real because of the semantics used by Petitioner below. It further argues that this case presents unique facts. (Respondent's Brief, 5, 6)

The question presented is:

> "May an individual union member sue to [1] vacate an arbitration award *and* [2] enforce a collective bargaining agreement, where the union has represented him fairly before the arbitral panel, but members of the arbitral panel were biased against him and/or the employer's conduct in the arbitration amounted to repudiation of the contract grievance procedure?" (emphasis and interlineation added)

Respondent misconceives the question in asserting that the sole question presented is merely "whether an action by an individual *to vacate* ***an arbitration award*** . . . can be maintained . . .." (Respondent's Brief, 4) Indeed if Petitioner succeeded merely in vacating the arbitral panel's decision in his case, that would afford him no material relief. He must also positively enforce the contract in order to resecure his employment.

To achieve this, the district court would have discretion either to order resubmission of his contract claim to a new arbitration panel supervised by the court, *Yates v. Yellow Freight Systems*, 501 F. Supp. 101 (S.D. Ohio, 1980), or to construe the contract itself and order relief. *Smith v. Pittsburgh*

Gage & Supply Co., 464 F.2d 870 (3d Cir. 1972); *Dogherra v. Safeway Stores*, 679 F.2d 1293 (9th Cir. 1982).

Similarly in ordinary "hybrid" cases, where an individual sues a company to enforce a collective bargaining agreement and a union for breach of duty,[1] the district court has the option of itself resolving the merits of the underlying contract claim. *See e.g. Scott v. Anchor Motor Freight*, 496 F.2d 276 (6th Cir. 1974), *cert. den.* 419 U.S. 868, 997 (1974).

In the court of appeals Petitioner suggested that a case such as the present could possibly be regarded as a "hybrid" despite there being no claim of unfair union representation, because as in ordinary "hybrids" he must first show the grievance procedure was tainted before he can proceed to enforce the contract. But he was careful to note that his case "should not stand or fall on a semantic distinction not made by statute." (Appellant's Brief, 10)

Rather, the real issue was whether a claim had been stated (regardless what it was called). The court of appeals majority answered "no." Without using the term "hybrid," this Court and other courts of appeals have said "yes." See Petition at 7-10. The majority below was not confused by semantics. It simply rejected the reasoning of the other courts.

As to the claimed "uniqueness" of the facts here, they are no more unique than those in the cited cases which have allowed claims such as Petitioner's to proceed.

Accordingly a clean issue is presented to this Court for resolution.

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[1]See *e.g.*, cases cited in the Petition 7 n.3.

B. No Other Issue Is Before This Court, And In Any Event There Is No Other Ground On Which To Affirm The District Court

Respondent alternatively argues that the district court's decision can be affirmed on the basis of the three-month limitation of the United States Arbitration Act, 9 U.S.C. § 12. (Respondent's Brief, 6-7) Neither the majority nor dissent below addressed this contention. Absent a cross-petition this issue is improperly before this Court.

But should the Court wish to consider it Petitioner will briefly summarize his position as presented to the court of appeals. It arises from the dual nature of the claim set out in the complaint and in the Question Presented.

Though as discussed above this case is not an ordinary "hybrid" and may not be a "hybrid" at all, the "hybrid" case law provides a ready analogy to this for time-bar purposes. *Del Costello v. Teamsters*, 462 U.S. 151 (1983) applied the six-month time limitation of Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), to "hybrid" cases. In rejecting a three-month arbitration limitation, *Del Costello* emphasized that unlike parties to a commercial arbitration, individual employee plaintiffs are often unsophisticated. They are called on within the limitations period to evaluate the adequacy of the union's representation, retain counsel, investigate matters which were not at issue in the arbitration, and frame the suit. 462 U.S. at 165-66. *Del Costello* also saw a "family resemblance" between the union's obligation under the N.L.R.A. and the federal common law of fair representation. 462 U.S. at 170. And it noted that the employer's contract breach may also amount to an unfair labor practice. *Id.*

All of these considerations apply with equal force here. Petitioner was an individual employee and had to hire a lawyer.

He had to evaluate the adequacy of arbitral panel members, which was not at issue in the arbitration,[2] and frame the suit. He had to investigate the union's conduct for a possible breach of duty. And the company's action here bore a "family resemblance" to an unfair labor practice.[3]

Finally, application of a different time-limit would cut against the principle of uniform accrual and tolling dates in employee actions against employers and unions. *Del Costello, supra*, 462 U.S. at 169 n.19. For instance if Petitioner's investigation had disclosed both a breach by the union and misconduct by the arbitrators (as in *Yates, supra*), or both a union breach and company repudiation (as in *Smith v. Pittsburgh Gage & Supply Co., supra*), the district court's ruling would require application of different three- and six-month limitation periods to each claim.[4]

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[2]The grievance procedure did not permit or acknowledge the ability of a grievant to challenge the committee's ability to render a fair decision. (Complaint § 13(b))

[3]Fleet itself suggested this in its seventh affirmative defense urging N.L.R.A. preemption of certain complaint allegations. See Complaint §§ 5(e), 5(f), 13(c). Despite the resemblance the claims are not preempted. *Smith v. Evening News Association*, 371 U.S. 195, 197 (1962); *Wm. E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974).

[4]If the Court rejects the above analogy to "hybrid" cases, the question of the proper limitation is an open question. *Del Costello, supra*, 462 U.S. at 158, n.12; *Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electrical Corp.*, 736 F.2d 896 (3rd Cir. 1984). *See, e.g., Occidental Chemical Corp. v. Local 820, International Chemical Workers Union*, 853 F.2d 1310 (6th Cir. 1988) (three-month limitation of United States Arbitration Act); *International Union of Elecrical Workers v. Ingram Mfg. Co.*, 715 F.2d 866 (1st Cir. 1983) (state statute of limitations).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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